United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7201

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7201

HOTAFT MANAGEMENT CORPORATION,

Plaintiff-Appellant

-against-

AMERICAN TELEPHONE & TELEGRAPH CO. and THE NEW YORK TELEPHONE COMPANY,

Defendants-Appellees.

APPEAL OF AN ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DISMISSING PLAINTIFF'S CAUSE OF ACTION

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PLAINTIFF-APPELLANT'S BRIEF

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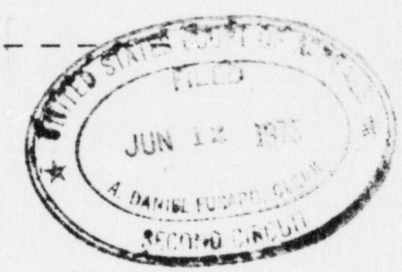

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PLAINTIFF-APPELLANT'S BRIEF

S. ROBERT LEE
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QUESTIONS PRESENTED

1. That the District Court erred in dismissing the Plaintiff's cause of action on the basis of lack of Federal jurisdiction.

2. That the District Court improperly dismissed the Plaintiff's cause of action without properly determining the issues presented on their merits and

   (a) did the District Court err in not liberally construing the Plaintiff's pleadings and

   (b) did the District Court err in dismissing Plaintiff's cause of action in not allowing Plaintiff the benefit of the presumption of the truth of the Plaintiff's allegation and

3. Did the District Court improperly deny Plaintiff in the injunctive relief sought.

PRELIMINARY STATEMENT

This is a civil action alleging a breach of contract, interference with Interstate Commerce, the depravation of property in violation of Due Process, in violation of Laws and Acts of Congress. Plaintiff is appealing from an order of the Honorable Robert L. Carter, dated March 5, 1975, denying Plaintiff motion for temporary injunction and dismissing Plaintiff's cause of action.

STATEMENT OF THE CASE

Plaintiff, Hotaft Management Corp., operates a large hotel in the City of New York, known as the Hotel Taft. The Defendants, American Telephone Company and New York Telephone Company, provide the telephonic communication necessary for the Plaintiff's operation of business and interstate communication. The Defendant made an initial demand for the payment of a deposit by the Plaintiff and thereafter the Plaintiff and Defendant entered

into a written agreement whereby the Plaintiff would deposit $30,000.00 as security with the Defendants. After the making and executing of a written contract (a copy of which is hereto annexed as exhibit B) the Defendant unilaterally abrogated the written contract and breached the same. The Defendants advised the Plaintiff that their demand for a deposit was increased from $30,000.00 to $56,000.00 and threatened to discontinue and interrupt all incoming calls to Plaintiff's hotel. It appears that approximately 80% of Plaintiff's incoming calls are represented by calls from other states and approximately 90% of Plaintiff's outgoing calls represented long distance telephone calls to other states. Therefore, the vast preponderance of the services rendered by the Defendants for which services the Plaintiff has made payments to the Defendants consisted of transactions in Interstate Commerce.

The Defendant's billing to the Plaintiff for the telephone service is divided in two general categories:

1) A charge for the use of the telephone equipment which charge is imposed one month in advance and,

2) A charge for the actual usage of the equipment in making outgoing telephone calls which are charged retroactively for a 30 day period.

The Defendant alleged that the average total monthly billing, including the prepaid charge for the equipment, amounts to $28,000.00 per month. The Plaintiff's billing indicates that the average charge is approximately $22,000.00 per month. The Defendant argued before the Honorable Judge Carter that the deposit which the Defendant demanded is to be twice the amount of the average monthly billing thus computing a deposit of $56,000.00. The Plaintiff argued before the Honorable Judge Carter that the average monthly billing of $22,000.00 would be represented by approximately $10,000.00 per month of advance equipment billing so that the maximum deposit on a two month basis would be properly represented by the amount of $22,000.00 and not $56,000.00. In addition

the Plaintiff argued that a written agreement was entered into for the amount of $30,000.00 which is binding on both parties and the Defendants have breached the said written agreement unilaterally thus creating a cause of action for the breach of contract in favor of the Plaintiff.

No charges whatsoever are imposed by the Defendants for incoming telephone calls. Thus in the Defendants threat to discontinue incoming telephone calls, the Defendants clearly breached their duty as provided in Laws and Statutes of the United States, and attempted to deprive the Plaintiff of property in violation of the Due Process clause of the Constitution.

The substance of these allegations were contained in the complaint filed by the Plaintiff as against the Defendants and enumerated various causes of action which said causes of action were dismissed by the order of the Honorable Judge Carter.

It is respectfully submitted by the Plaintiff that the lower court erred in dismissing Plaintiff causes of action and further that the lower court erred in dismissing Plaintiff's petition to enjoin the Defendants from interfering with the incoming telephone communications of the Plaintiff.

ARGUMENT

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED

The District Court Erred In Dismissing Plaintiff's Action

Since the inception of the Federal Rules of Civil Procedure, pleadings have been liberally construed so "as to do substantial justice", 28 U.S.C.A. Rule 8 (f). The pleader is merely required to allege sufficient facts as to place the defendants on notice that a claim has been made upon which relief may be granted. See Lewis v. U.S. Slicing Machine Co., D.C. Pa. 1970, 311 F. Supp. 139. Johnson v. Hunger, D.C. NY 1967, 266 F. Supp. 590., U.S. v. Mercantile Trust Co. Nat. Ass'n., D.C. Mo. 1966, 263 F. Supp. 340, reversed on other grounds 88 S. Ct. 106, 389 U.S. 27, 19 L. Ed. 2d 28 . Donson Stores, Inc. v. American Bakeries Co., D.C. N.Y. 1973, 58 F.R.D. 485.

> 28 U S.C. Rule 8, General Rules of Pleading
> "(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds

upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e) Pleading To Be Concice and Direct; Consistency.
(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one court or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

The plaintiff in this action has stated the grounds for its claim in its complaint in sufficient language, clarity and conciseness so as to comply with the above stated requirement.

It has previously been decided in New York State Waterways Association, Inc. et. al., Appellants, v. Henry L. Diamond et. al., Appellees: 469 F. 2d 419 (1972) that:

> "While plaintiffs' complaint is hardly a model of compliance with the Federal Rules of Civil Procedure 8(2)(1) requirement of a "short and plain" statement of the claimed jurisdictional basis of a suit, it is our duty to read it liberally, to determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded. Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969); 5 C. Wright & A. Miller, Federal Practice and Procedure (1969) S. 1206."

It has also been held that a dismissal of an action does not lie unless it appeared to a certainty (emphasis supplied) that he was entitled to a no relief under any state of facts which could have been proved

in support of the claim." See, John H. Kent, Jr., Trustee in Bankruptcy of C. M. Jones & Company, v Walter E. Heller & Company, 349 F.2d 480, Arthur H. Richland Company, v. Harper, 302 F.2d 324 (5th Cir. 1962), Dun v. Tallahassee Theatres, Inc., 333 F.2d 630, 631 (5th Cir. 1964).

In Andrew L. Mannings, a minor, by his father and next friend, Willie M. Mannings, et. al., v. Board of Public Instruction of Hillsborough County, Florida, et. al. 277 F.2d 370, 1960, the Court further enunciated on this doctrine as stated:

> "(1) We have repeatedly said that under the Federal rules, (Rule 8 (a), F. R. Civ.P., U.S.C.A.), a complaint may not be dismissed under Rule 12(b) (6) for a failure to state a claim upon which relief can be granted if under any theory of recovery a case for relief can be made out by the proof. Black v. First National Bank of Mobile, Ala., 5 Cir., 255 F. 2d 373, 375; Carss v. Outboard Marine Corp., 5 Cir., 252 F. 2d 690,691; Demandre v. Liberty Mutual Ins. Co., 5 Cir., 264 F. 2d 70, 72. As stated by Moore, "A complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff

> is entitled to no relief under any state of facts which could be proved in support of the claim." 2 Moore's Federal Practice p. 2245.
>
> (2) It is equally well understood that in construing a complaint to test out its sufficiency to withstand a motion to dismiss for failure to state a claim upon which relief can be granted, all of the facts pleaded must be taken to be true."

and this principle was further refined in Great Atlantic & Pacific Tea Company, Inc., National Food Stores, Inc., and the Kroger Co., v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union No. 88, AFL-CIO, and It's Affiliate: 410 F 2d 650:

> "(1) In view of the Federal Rules of Civil Procedure, generally, and specifically 8(2)(2), 8(e)(1) and 8(f), the Supreme Court has held that "(i)n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for the failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102. 2 L.Ed. 2d 80 (1957)."

Once it has been decided that the pleader may have a claim upon which relief may be granted, the court must then construe the allegations in the complaint as true.

See, A. T. Brod & Co. v. Perlow, C.A.N.Y. 1967, 375 F 2d 393, Atchley v. Greenhill, D.C. Texas, 1974, 373 F. Supp. 512, U.S. ex. rel. Smith v. Heil, D.C. Pa. 1970, 308 F. Supp. 1963., Haczela v. City of Bridgeport, D.C. Conn. 1969, 299 F. Supp. 709., Schelman v. Burlington Industries, Inc., D.C. N.Y. 1966, 255 F. Supp. 847., Shapiro V. Royal Indemnity Co., D.C. Pa., 1951, 100 F Supp. 801, Jenkins v. McKeithen, LA 1969, 89 S.Ct. 1843, 395 U.S. 411, 23 L.Ed. 2d 404, rehearing denied 90 S.Ct. 35,396. U.S. 869.

In Jenkins v. McKeithen, (supra), the Supreme Court, Mr. Justice Marshall writing the majority opinion clearly stated:

> "For purposes of motion to dismiss, material allegations of the complaint are taken as admitted and complaint is to be liberally construed in favor of plaintiff."

In its complaint the allegations of the plaintiff were sufficient to state a cause of action as required by Rule 8. Moreover, plaintiff verily believes that a cause of action was stated under any and all pleading requirements and standards so as to entitle the plaintiff to a full plenary trial.

It is important to note that all motions and all arguments before the Hon. Judge Carter proceeded without any question being raised as to the adequacy or propriety of the complaint. It is respectfully submitted that the

position of the defendants acknowledging the propriety and validity of the complaint and the failure or refusal of the defendants to question or attack the complaint should have precluded the lower court from entering the order now being appealed from. Since the issue of the propriety and validity of the complaint have never been raised in the lower court, the plaintiff had neither the opportunity to argue on the issue of the plaintiff's causes of action, nor did the plaintiff have an opportunity to submit an amended complaint. It is respectfully submitted that these circumstances alone warrant the reversal of the order made by the United States District Court.

However, it is respectfully submitted that the complaint and the causes of action stated in said complaint were so fully and properly stated as to comply with all of the requirements and rules of pleading.

There is no question but that the amount in controversy exceeds the sum of $10,000.00; there is no question but that there are Federal laws and statutes dealing with the duties and obligations of the defendants with regard to supplying of telephone services; there is no doubt that a written contract was entered into between the parties affecting interstate business relations. There is a substantial Federal question raised by the complaint as to the right, propriety and authority of an interstate

communication company such as the defendants with regard to an arbitrary and capricious, and possibly willful and malicious termination of incoming (my italics) telephone calls for the sole purpose of forcing its will upon the plaintiff, all in violation of its legal and statutory obligations and duties to provide the plaintiff with interstate communications.

A mere perusal of the prior pleadings clearly indicate that Judge Carter has erred in his opinion and order in denying to the plaintiff the presumptions to which its allegations are entitled and in denying to the plaintiff the liberal construction of the complaint required by the Rules of Civil Procedure.

It is respectfully submitted that the order appealed from should be reversed and the matter set down for trial.

> "...the plaintiff is entitled to its day in court", Kingwood Oil Co. v. Bell et al., 204 F.2d 8.

Federal Court has Jurisdiction Over the Controversy in Question

The defendants have with complete impunity and disregard of its legal obligations, breached its contract with the plaintiff. The defendants, relying on their monopolistic grip over the telephonic communication industry, both interstate and intrastate, have sought to obtain monies from plaintiff over and above that agreed to between the parties, threatening and, in fact, possessing the combined power to totally isolate the plaintiff, telephonically, from the outside world. These abuses, due to their far-reaching consequences, must be brought before the Federal Courts.

It must be further pointed out that the threatened actions by the defendants, to wit: the terminating of all incoming service (emphasis supplied) adversely affects not only the plaintiff but also the defendants themselves by depriving them of any and all revenue which would normally have been obtained from the placement of calls to the plaintiff from outside callers and, therefore, this action has no rational relation to the plaintiff's billing. This loss of revenue is passed on to the consuming public in the form of rate hikes.

The Federal Legislature has pre-empted the field in the area of all forms of interstate communications "to make available...to all of the people of the United States a rapid, common, efficient, nation-wide wire and radio communications service with adequate facilities at reasonable charges...and for the purpose of securing a more effective execution of this policy by centralizing authority..." 47 U.S.C. S.151 et.seq. (Plaintiff's memorandum in support of its motion for a preliminary injunction covered this point extensively and is therefore appended to this brief as Exhibit A).

This action is based upon the defendants' breach of a written contract with the plaintiff and the threatened termination of incoming service of which approximately 80% represents interstate communication under Federal guidelines. The defendants thus violated the provisions of the Federal Communications Act of 1934.

In a case on which the facts and issues were on all fours with this action, previously decided by this very Court, to wit: Ivy Broadcasting Company, Inc. v. American Telephone and Telegraph Company, and New York Telephone Company 391 F.2d 486, 490 (2d Cir. 1968), it was stated as follows:

> "(4) We hold that the court had jurisdiction over the plaintiff's actions for damages resulting from negligence or the breach of contract in the rendition interstate telephone service. The test we have stated for

> determining whether a complaint presents a federal question is whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred" from federal law, or whether a properly pleaded "state created" claim itself presents a "pivotal question of federal law," for example because an act of Congress must be construed or "'federal common law' govern(s) some disputed aspect" of the claim."
>
> "McFaddin Express, Inc. v. Adley Corp., 346 F.2d 424, 426 (2 Cir. 1965), cert. denied, 382 U.S. 1026, 86 S.Ct. 643, 15 L.Ed. 2d 539 (1966); see T. B. Harms Co. v. Eliseu, 339 F.2d 823, 826-828 (2 Cir. 1964)."
>
> "(8.9) These cases lead us to conclude that questions concerning the duties, charges and liabilities of telegraph of telephone companies with respect to interstate communications service are to be governed solely by federal law and that the states are precluded from acting in this area. Where neither the Communications Act itself nor the tariffs filed pursuant to the Act deals with a particular question, the courts are to apply a uniform rule of federal common law." (emphasis supplied).

This view must clearly apply in an action such as the one at bar, where it is obvious from the facts that the defendants wield a sword which cuts deeply and directly into that body of interstate communications regulated solely by the Federal Government. Clearly relief must be had in the Federal Courts.

Furthermore, it is clear that the Johnson Act, 28 U.S.C. S.1342 relied upon in Judge Carter's opinion in denying jurisdiction is totally inappropriate and in fact tends to support the plaintiff's argument. 28 U.S.C. 1342:

> "The district courts shall not enjoin, suspend, or restrain the operation of, or compliance with, any order affecting rates

chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political sub-division, where:

(1) Jurisdiction is based solely (emphasis supplied) on diversity of citizenship or repugnance of the order to the Federal Constitution; and

(2) The order does not interfere with interstate commerce; (emphasis supplied)"

Paragraph 2 of Section 1342 specifically excepts any matter or order which interferes with interstate commerce. This is exactly the damage suffered by the plaintiff. The threatened action by the defendants in terminating incoming service clearly will deprive the plaintiff of all interstate "bookings" for reservations which represents ninety per cent of the plaintiff's business.

Jurisdiction in this matter must be with the Federal Judiciary. Any decision to the contrary would allow the disruption of interstate communications.

It is respectfully submitted that the temporary injunction should have been granted, particularly in view of the fact that a full cash deposit as required by the Court has been deposited with the Clerk of the Court, thus avoiding any injury or prejudice to the defendants.

CONCLUSIONS

The order of the lower court should be reversed in all respects.

Respectfully submitted,

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JOSEPH R. McCOY III,

Of Counsel.

EXHIBITS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOTAFT MANAGEMENT CORP.,

Plaintiff, Hon. Judge Robert L. Carter

-against- 75 Civ. 812

NEW YORK TELEPHONE COMPANY, INC.
and AMERICAN TELEPHONE &
TELEGRAPH COMPANY,

Defendants.

Plaintiff's Memorandum of Law

Preliminary Facts

The plaintiff is the operator of a hotel consisting of some 1,500 rooms and employing 300 persons. The hotel has for many years maintained a telephone installation consisting of central switchboards and approximately 2,000 phone instruments.

Telephone bills are rendered by the Telephone Company on or about the 16th day of each and every month and pursuant to the regulations and usual practice, such telephone bills are due and payable 25 days after the receipt of the bill. In rendering its bills, the defendant utilizes the facilities of the U.S. mails.

The plaintiff was acquired by new ownership on or

about September 9, 1974, and has since the time of the acquisition received telephone bills, through the U.S. mails, in October, November and December of 1974, and January of 1975. All these bills were promptly paid before the expiration of the 25th day and the plaintiff is completely current in payment of all of its telephone bills.

The telephone bill is structured by the defendant so that a portion of the bill representing charges for the equipment is paid one month in advance and a portion of the bill representing services rendered is paid one month behind. Since the recent average telephone bill amounts to $22,000.00 per month, $11,000.00 of that amount is paid one month in advance and $11,000.00 is paid for the preceeding month's services. At this time the plaintiff has therefore paid to the defendant approximately $11,000.00 for the rental of equipment which constitutes a prepayment of the amount and reflects a prepaid security factor to the defendant. In the event that the service were to be terminated at this time, the unused portion of this $11,000.00 prepayment would have to be returned by the defendant.

In addition to the foregoing $11,000.00, representing the prepaid amount, the defendants are holding an additional $20,000.00 of cash security heretofore deposited together with an amount of $20,000.00 deposited with the Clerk of this Court in connection with an issued temporary restraining order.

As of this time the defendants are obtaining the benefit and use of some $51,000.00 in various security deposits.

With regards to the amounts charged for telephone usage, which is approximately $11,000.00 a month, more than 90% is allocatable to the use of long distance lines in interstate commerce, which lines are owned and managed by the defendant, A. T. & T. The ownership and management of the long distance lines are subject to the interstate commerce clause of the U.S. Constitution and are subject to the Communications Act of 1934.

Pursuant to a tariff established by the Public Service Commission of the State of New York, which in sum and substance states that the defendants may demand up to the sum of two months' average billing as security in the event that a particular user's credit information is not reasonably satisfactory to the Telephone Company, the defendants initiated a request for a security deposit. Prior to the acquisition of the Hotel by this plaintiff, no security deposit and no demand for a security deposit had ever been made by any of the defendants for either service rendered or equipment used by the facility known as the Hotel Taft. The defendants thereupon contacted the plaintiff and after negotiations, made a written demand for a security deposit in the negotiated and agreed upon sum of $30,000.00. The plaintiff accepted these terms and has fulfilled all of

its obligations in connection therewith. The defendants are now making the claim that they are entitled to a security deposit of some $56,000.00 in complete disregard of the previous written agreement with the plaintiff. At no time have the defendants requested any credit information nor have they, on information and belief, ever run a credit check on the plaintiff. The Consolidated Edison Company, whose monthly bills exceed those of the defendants, after reasonable credit checking, have not requested any security deposits nor were any security deposits given them. Thus, the defendants have failed to comply with even the first step which might lead them to demand a security deposit.

However, since the vast preponderance of service is in fact in interstate commerce, the Federal Government preempted the field and in any event the New York State Public Service Commission would have no power or jurisdiction in the matter.

Since the defendants have threatened to discontinue the incoming telephone service of the plaintiff, the plaintiff has requested a temporary injunction to prevent the defendant from disturbing the status quo and causing irreparable harm to the plaintiff.

This memorandum is submitted by the plaintiff in support for its application for a temporary injunction pending the trial of its law suit against the defendant.

II

The United States District Court Has Jurisdiction Over The Subject Matter And Persons In The Litigation

Since the inception of our form of Government, the Congress, through enactment of various laws and legislation, under the powers granted to it by the United States Constitution's Interstate Commerce clause has preempted the various states in regulating all forms of interstate transactions. After the establishment of the Interstate Commerce Commission, the Congress amended the Interstate Commerce Act on June 18, 1910, 36 Stat. 530, to include common carriers engaged in interstate telegraph, telephone and radio transmissions. By the Communications Act of 1934, Congress established a separate and distinct commission, the Federal Communications Commission, to regulate interstate telegraph, telephone and radio communications, Communications Act of 1934, 48 Stat. 1064 as amended 47 U.S.C. Sec. 151-609. The obvious intent of the Act was "to make available...to all the people of the U.S. a rapid, common, efficient, nationwide wire and radio communications service with adequate facilities at reasonable charges...and for the purpose of securing a more effective execution of this policy by centralizing authority...", 47 U.S.C. Sec. 151 et seq. The Act specifically required common carriers to (1) furnish to

all people communication service, upon reasonable request, 47 U.S.C. Sec. 201; (2) file tariff schedules with the FCC effectively abolishing any unlawful or discriminatory practices or preferences in charges, practices, classifications, regulations, facilities, or services by any means or device to make or give any value or reasonable advantage to any particular person, class of persons, or locality, 47 U.S.C. 202; and, (3) not make any changes in charges or tariff schedules unless filed with the FCC and further, the carrier is not authorized to participate in any form of interstate communications unless and until required tariff schedules have been filed, 47 U.S.C. 201-205. The District Courts were granted jurisdiction to issue writs of mandamus requiring a common carrier to furnish facilities and services to the party reasonably applying thereto, 47 U.S.C. 406.

The Johnson Act, 28 U.S.C. Sec. 1342, which somewhat restricts the jurisdiction of the U.S. District Court requires the fulfillment of certain preconditions before such restriction would apply. Thus, if the jurisdiction is solely on the diversity of citizenship and does not interfere with interstate commerce, must be fulfilled. In the instant case, jurisdiction is not based on diversity and since more than 90% of the total services are in fact in interstate commerce, the provisions of The Johnson Act does not apply. Clearly, the purpose of The Johnson Act was to fortify the Interstate Commerce clause of the U.S. Constitution so as to

eliminate Federal jurisdiction in purely local matters. Since this litigation does not involve purely local matters but does in fact involve interstate commerce, the U.S. District Court has exclusive jurisdiction in the instant litigation.

The plaintiff and defendants entered into a written contract as to the requirements of the plaintiff in regard to any and all security deposits. The defendants, then, in complete and absolute breach of the written contract with the plaintiff, and by exertion of improper pressure emanating from its monopolistic grip on interstate communications, demanded an increased security deposit under the threat of termination of all incoming services to the guests and customers of plaintiff's hotel. Such incoming services do not create any additional billing since no charges are imposed on the plaintiff for incoming telephone calls but only for outgoing telephone calls. In attempting to terminate incoming telephone calls, the defendants are clearly discriminating as against the plaintiff in imposing terms and conditions not imposed upon any of its other customers and in violation of the provisions of The Communications Act of 1934.

The leading case in this jurisdiction on issues which are almost precisely the same as in this case (except that the defendants do not have a counterclaim) was decided in the U.S. Circuit Court of Appeals, Second Circuit, Ivy Broadcasting Co., Inc. v. AT&T, 391 F.2d 486, 490 (2d Cir.1968),

in which the Court stated "it appears present the question--apparently one of first impression--whether, in the absence of diversity of citizenship, a Federal Court has jurisdiction over a claim for negligence and breach of contract in the rendition of interstate telephone service by carriers regulated under the Communications Act of 1934... . We conclude that plaintiff's claims arise under Federal law within the meaning of 28 U.S.C.A. 1331 and, since the amount in controversy exceeds $10,000.00, we hold that District Court had jurisdiction of the causes of action stated in the complaint."

47 U.S.C. Sec. 406 states:

" 406. Compelling furnishing of facilities; mandamus; jurisdiction

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined,

upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: Provided further, That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter."

The general purpose of a preliminary injunction is to preserve status quo pending final determination of action, but where it is impossible to place parties in exact positions which they enjoyed prior to disagreement, the trial court has discretion to fashion such preliminary injunction, Unicon Management Corp. v. Koppers Co., 366 Federal Second 199.

It is respectfully submitted that this court does have jurisdiction in the instant litigation and that a temporary restraining order was properly issued from this court.

The Plaintiff Is Entitled
To A Preliminary Injunction

As previously stated, the plaintiff owns and operates a large hotel in downtown New York City; it is incumbent upon the hotel to provide the normal telephonic communications to its guests, most of whom are "out-of-towners" and therefore the required services are necessarily interstate communications. The defendants named herein are

the only (emphasis supplied) businesses providing the required service for the hotel. If the defendants are allowed to terminate telephonic service to the plaintiff prior to the trial of this action, which will in fact totally determine whether defendants may terminate service, the plaintiff will be irreparably damaged both by the substantial loss of business and the destruction of any and all good will and business reputation which the plaintiff presently commands in the hotel industry.

The purpose of a "preliminary injunction" is a provisional remedy designed to preserve the "status quo" until the case can be heard on the merits, and the "status quo" is the last uncontested status which preceded the pending controversy. Westinghouse Electric Corporation v. Fell Sewing Machine Co., 256 F.2d 806; Wooten v. Ohler, 303 F.2d 759; and Unicon Management Corp. v. Koppers Co., 366 F.2d 199.

The irreparable injury sustained by the plaintiff will be the immediate reduced occupancy from which the plaintiff derives its total revenue. This loss of revenue would either force the plaintiff into bankruptcy for not being able to timely meet its obligation or result in a foreclosure action by the mortgagee. Clearly, this would qualify as an irreparable injury.

As the plaintiff is basing his action on the breach of a written contract, where the breach is also established by written evidence, it is probable that the plaintiff will succeed on its claim at the time of trial.

In order to obtain a preliminary injunction, the moving party must satisfy the court that in all probability he will prevail on a trial of issues and that he will suffer irreparable harm if the preliminary injunction is not issued, Unitarian Church West v. McConnell, 337 F. Supp 1252, affirmed 474 F 2d 1351, vacated 94 S.Ct. 1927.

It should again be noted here that the granting of the injunction in no way harms the defendants as the plaintiff has $20,000.00 presently being held by defendants as well as $20,000.00 paid into the court as an undertaking for this action, to offset any charges of the plaintiff for service pending the hearing of this action.

Conclusions

It is respectfully submitted that this court has in fact jurisdiction over thepersons and subject matter of the instant litigation and that a preliminary injunction should properly issue to maintain status quo of the parties pending the final litigation argument.

Respectfully submitted,

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JOSEPH R. McCOY III

of Counsel

Exhibit A

September 12, 1974

Mr. R. Lee
Taft Hotel
777 Seventh Avenue
New York, New York 10019

Dear Mr. Lee:

As per our conversation this morning you agreed to pay a $30,000.00 deposit for the Ho-Taft Management Corporation in three installments as follows:

$10,000.00 by 9/15/74
10,000.00 by 10/11/74 - 10/28
10,000.00 by 11/11/74 11/25

Concurrently, you agreed to pay the bill within five (5) days of receipt. Your bill date is the sixteenth, you should receive the bill by the twenty-fourth so the bill should be paid no later than the twenty-eight of each month.

These arrangements are in lieu of a deposit of $56,000.00. Any deviation from our agreed payment arrangements would cause renegotiation of the full $56,000.00 deposit.

If the deposit payments or the bill payments are not made by the dates agreed upon your outgoing service may be interrupted. Your incoming service will be terminated five days later. An there's a charge for restoring disconnected service.

Exhibit A

I hope none of this action is necessary. I welcome you as a new customer and sincerely wish you well with your new enterprise. If I can be of any assistance please don't hesitate to call me.

Your truly,

S. P. Main
Manager

SPA:bp

Exhibit B

ACKNOWLEDGEMENT OF SERVICE

Defendant, New York Telephone Company, by _____, acknowledges receipt of two copies of Plaintiff-Appellant's Brief this 4th day of June, 1975.

Mildred Liebman

ACKNOWLEDGEMENT OF SERVICE

Defendant, American Telephone & Telegraph Company, by Charles V. Ryan, acknowledges receipt of two copies of Plaintiff-Appellant's Brief this 4th day of June, 1975.

Charles V. Ryan